IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1493

CAROLYN G. HOWARD, Respondent,

vs.

DONALD L. ALLEN, Petitioner.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for The Fourth Circuit

KENNEDY & PRICE
By: /s/ RICHARD M. KENNEDY, JR.
Attorneys for Respondent.
P. O. Box 11426
Columbia, S. C. 29211

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1493

CAROLYN G. HOWARD, RESPONDENT,

versus

DONALD L. ALLEN, PETITIONER,

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KENNEDY & PRICE
By: /s/ RICHARD M. KENNEDY, JR.
Attorneys for Respondent,
P. O. Box 11628
Columbia, S. C. 29211.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1493

CAROLYN G. HOWARD, RESPONDENT,

versus

DONALD L. ALLEN, PETITIONER,

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Carolyn G. Howard respectfully responds to the Petition for Writ of Certiorari and shows that the Writ should be denied.

1. That there is no substantial federal question involved.

2. That the two reasons for allowance of the Writ presented by appellant do not accurately portray the statutes and cases involved.

(a) The South Carolina "long arm" statute was enacted into law June 2, 1972, as Part Eight, Article Two, Sec. 10.2-803 (1) (C) of the 1962 *Code of Laws of South Carolina.* It made no provisions as to being effective at some future date.

(b) That statute to which appellant makes reference as being effective January 1, 1968 was the South Carolina Uniform Commerical Code as adopted by the legislature in

1966, Title 10.2, *Commercial Code,* Sections, 10.2-101 et seq. This statute affected substantive rights of commercial transactions and the legislature allowed over a year for the act to become effective so that banks and commercial institutions could adjust and prepare for the changes.

(c) It is true that a "long arm" statute was tacked onto the South Carolina Uniform Commercial Code in 1966 but this "long arm" statute was in violation of Section 17 of Article III of the Constitution of the State of South Carolina which requires every act or resolution having the force of law to relate to but one subject and that shall be expressed in the title. One state court and one U.S. District Court ruled that this 1966 "long arm" statute was unconstitutional.

3. That there is no issue of *Erie R. Co. v. Tompkins* in this appeal. The Court correctly applied the statute which was enacted into law June 2, 1972.

4. There is no analogous case in South Carolina which would bear on the issue. The one case, *Johnson v. Baldwin, 214 SC 552, 53 SE 2d 788* involved a "long arm" statute specifically directed to non-resident directors of local corporations. It was on its face prospective only in nature since it allowed a 30-day escape clause. Of more importance, the statute was of the "implied consent" type in that it named the Secretary of State of South Carolina as agent for substituted service upon the non-resident defendant. The Courts have repeatedly held that one cannot "impliedly consent" to the appointment of an agent for service of process "retroactively."

5. Appellant apparently confuses "long arm" statutes of the implied consent type with "long arm" statutes invoking jurisdiction based upon tortious conduct within the state which provide, not for substituted but for personal service direct upon the non-resident within his home state.

Those cases cited by appellant alleging a conflict among

Courts all involve statutes of the "implied consent" type which provide for service upon the Secretary of State or Director of Motor Vehicles as the agent for the non-resident.

CONCLUSION

The South Carolina "long arm" statute provides for personal service upon a non-resident defendant. No provision is made for substituted service upon some state official within South Carolina.

Jurisdiction is based upon tortious conduct committed within the forum state. The statute is curative in nature and its purpose is to cure past errors and omissions and by nature is retrospective in its application. SEGARS V. GOMEZ, D.C.S.C., Appendix, page 36.

This "long arm" statute of South Carolina cannot be compared as urged by the appellant, with those statutes and cases cited in the petition wherein a state achieves jurisdiction over a non-resident by the mere act of operating a motor vehicle, piloting a ship, or acting as a non-resident director of a local corporation. According to those statutes these acts constitute the appointment by the non-resident of some state official as his agent for the service of process.

Appellee respectfully submits that the Petition to grant a Writ of Certiorari to review the validity of the lower Court's affirmation of jurisdiction should be denied.

KENNEDY & PRICE
By: /s/ RICHARD M. KENNEDY, JR.
Attorneys for Respondent,
P.O. Box 11628
Columbia, S. C. 29211.